CHAPTER 11

TERMINATION

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11.1. INTRODUCTION

The complete severance of the parent-child relationship is an extremely serious step. The severance is absolute and permanent. Few State infringements on personal liberty are greater. On the other hand, termination of parental rights may make a child available, through adoption, for a new permanent relationship that would not otherwise be possible. Termination of one parent's rights may remove a dangerous influence from the child's life forever.

Under the Adoption Code, termination of parental rights may be effected voluntarily through release of parental rights or involuntarilywhere a putative father has not asserted his rights or interest in the child.[1] Under the Juvenile Code, a putative father has no standing to participate in the proceedings until he establishes paternity.[2] Additionally, under the Juvenile Code, the court terminates the rights of legal fathers and unknown fathers in order to make children available for adoption.[3]

Under the Juvenile Code, MCL 712A.1 *et. seq.*, the Family Division of the Circuit Court that has proper jurisdiction over a child may also terminate parental rights involuntarily. Child protective proceedings under the Juvenile Code have long been divided into two distinct phases: the adjudicative [or jurisdictional] phase and the dispositional phase. The adjudicative phase occurs first and involves a determination whether the trial court may exercise jurisdiction over the child, i.e., whether the child comes within the statutory requirements of MCL 712A.2(b). The dispositional phase involves a determination of what action, if any, will be taken on behalf of the child and such action can include termination at the first, or initial disposition hearings. These cases are referred to as original permanent custody trials as opposed to supplemental permanent custody trials. The dispositional hearing must be held after the adjudicative phase of the proceeding in which it was determined that the child was properly within the court's jurisdiction or after proper notice.[4] This chapter deals extensively with the authority of the family court to terminate parental rights against the wishes of a parent accused of child abuse or neglect.

11.2. JURISDICTION; VENUE; PARTIES

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1. MCL 710.21 *et.seq.*, MCL 710.28, 710.29 and 710.64, MCL 710.37

2. *In re AMB*, 248 Mich.App. 144, 174 (2001)

3. *In re KH, KL, KL and KJ*, 469 Mich. 621 (2004)

4. MCR 3.973(A) and (B). *In the Matter of A.M.A.C.*, 269 Mich. App. 533, 536-538 (2006)

11.2.1. *Jurisdiction*

The Michigan Juvenile Code, MCL 712A.2(b)(1)&(2), provides the statutory basis for family court jurisdiction over cases of alleged child abuse and neglect.

If, after proper adjudication, the Juvenile Court determines that a child falls within its jurisdiction, the court may consider whether the child is to be placed in the temporary or permanent custody of the court.[5] As discussed more fully below, termination of parental rights first requires a finding that the court has jurisdiction under MCL 712A.2(b). The court does not reach the question of termination of parental rights, even if requested in the original petition, until it has formally acquired jurisdiction under MCL 712A.2(b).

11.2.2. *Venue*

Venue of termination of parental rights proceedings in juvenile court lies in the County Juvenile Court that has existing jurisdiction, or, if termination is sought at the initial dispositional hearing, in the county in which the child is found.[6] Change of venue is governed by MCL 600.856(1). *See also* **Chapter 3, JURISDICTION**.

11.2.3. *Parties*

"Party" in child protective proceedings, includes the petitioner, the child, respondent, and parent, guardian or legal custodian.[7] For purposes of termination of parental rights, "respondent" is specifically defined as "(1) the natural or adoptive mother of the child and/or (2) the father of the child as defined by MCR 3.903(A)(7)."[8] (Putative fathers and the definition of "father" are discussed above in **Chapter 7, PRETRIAL**) The court rule specifically excludes persons from the definition of "respondent" who have legal custody only by court order [the language excludes foster parents and relatives].[9]

11.2.4. *Petitioner*

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5. MCL 712A.20
6. MCL 712A.2(b); *In re Mathers*, 371 Mich. 516, 526 (1963)
7. MCR 3.903(A)(18)
8. MCR 3.977(B)
9. MCR 3.977(B)

In nearly all cases in Michigan, the petitioner in a termination proceeding is the DHS. The statute sets out who may petition for termination of parental rights.

> [U]pon petition of the prosecuting attorney, whether or not the prosecuting attorney is representing or acting as legal consultant to the agency or to any other party, or petition of the child, guardian, custodian, concerned person as defined in subsection (6), agency, or the children's ombudsman pursuant to section 7 of the children's ombudsman act ...[10]

A "concerned person" who may file a petition for termination of parental rights under very limited circumstances means[11]:

> [A] foster parent with whom the child is living or has lived who has specific knowledge of behavior by the parent constituting grounds for termination under subsection (3)(b) [physical injury or physical or sexual abuse] or (g)[parent without regard to intent fails to provide proper care or custody for the child] and who has contacted the [Department of Human Services, formerly known as the Family Independence Agency], the prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and is satisfied that none of these persons intend to file a petition under this section.

11.3. COMMENCING THE ACTION

11.3.1. *Child in Foster Care*

Generally, child must be in foster care before a petition to terminate parental rights under MCL 712A.19b(3) may be granted.[12] In *Marin*, however, the Court of Appeals held that termination of parental rights of one parent may occur without termination of the parental rights of the other parent, and it is not necessary that the child be placed in foster care in order for the termination petition to be entertained.[13]

11.3.2. *Petition*

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10. MCL 712A.19b(1)

11. MCL 712A.19b(6)

12. The definition of “foster care” includes relative placement. *See* MCL 712A.13a(1)(e) and MCR 3.903 (C)(4)(b); MCL 712A.19b(1)

13. *In re Marin*, 198 Mich.App. 560 (1993)

Parental rights of the respondent over the child may not be terminated unless termination was requested in an original, amended, or supplemental petition.[14] *See* **Chapter 5, PETITION.** The petition must specify facts that would warrant termination under the statute.[15]

11.3.3. *Notice*

Not less than 14 days before a hearing to determine if the parental rights to a child should be terminated, written notice of the hearing shall be served upon all of the following[16]:

a. The agency responsible for the care and supervision of the child,
b. The person or institution having court-ordered custody of the child,
c. The parents of the child and the attorney for the respondent parent,
d. The guardian or legal custodian of the child,
e. The guardian ad litem for the child,
f. The lawyer-guardian ad litem for the child,
g. The attorneys for each party,
h. The prosecuting attorney if the prosecuting attorney has appeared in the case,
i. The child, if the child is 11 years of age or older,
j. any tribal leader, if there is an Indian tribe affiliation, and,
k. Any other person the court may direct to be notified.

A party may waive summons.[17] The waiver must be in writing and, in a termination proceeding, the party must be advised of[18]:

a) the nature of the hearing;
b) their right to an attorney and the right to trial by the judge or jury, including, where appropriate, that there is no right to a jury at a termination hearing;
c) the possibility that the hearing could result in termination of parental rights; and
d) the contents of the petition by providing a copy of the petition attached.

The Michigan Court of Appeals has held, however, that a written waiver of service regarding a temporary custody petition is not sufficient to waive

14. MCL 712A.19b(1); MCR 3.977(A)(2)
15. *Harmsen v. Fizzell*, 351 Mich. 86 (1957); *In re Mathers*, 371 Mich. 516 (1963).
16. MCR 3.921(B)(2) and (3); MCL 712A.19b(2)
17. MCR 3.920(E)
18. MCR 3.920(B)(3)

notice of hearing and service of process with regard to a subsequently filed petition to terminate parental rights.[19]

Substitute service by publication is appropriate where the respondent's whereabouts are unknown and publication was made pursuant to MCL 712A.13.[20] *See* MCR 3.920 and discussion of formal notice above at **Chapter 7, PRETRIAL.**

Statutory notice and summons requirements are jurisdictional. Failure to serve the respondent with a summons or notice of hearing is a jurisdictional defect which voids all further proceedings in the court.[21] In *Brown*, failure to personally serve the respondent with a summons or notice of hearing as required by MCL 712A.12 was fatal to the court's jurisdiction, even where the respondent's attorney received a copy of the amended petition, the respondent appeared at the hearing, indicating she had actual notice of the time and place, and she was apprised of the allegations in the petition.

In *In re Slis*, however, the Court of Appeals affirmed the trial court's ruling that a voluntary appearance at a parental termination hearing and the signing of a waiver of notice to future hearings satisfied due process requirements for a parental termination hearing, where the hearing had been continued for over a month and the parent signing the waiver was provided with notice of the new date.[22]

After a petition for termination of parental rights is filed with the Juvenile Court and notice is provided to all the parties, the court generally schedules a pretrial hearing at which the parties are advised of their rights, counsel is assigned if that has not been done already, a plea is entered, and the matter is set for trial if the respondent contests the petition.

If a petition to terminate parental rights is filed, parenting time for a parent subject to such a petition is automatically suspended and remains suspended until a decision is made on the termination petition. If, however, the parent establishes and court determines that parenting time will not harm the child, the court may order parenting time in the amount and under the conditions the court determines appropriate.[23]

11.3.4. *Right to Counsel*

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19. *In re Atkins*, 237 Mich.App. 249 (1999)
20. *In re Sears*, 150 Mich.App. 555 (1986)
21. *In re Atkins*, *supra*; *In re Brown*, 149 Mich.App. 529 (1986); *In re Mayfield*, 198 Mich.App. 226 (1993)
22. *In re Slis*, 144 Mich.App. 678 (1985)
23. MCL 712A.19b(4)

Both the child and respondents are entitled to counsel in termination proceedings. *See* **Chapter 17, LAWYERS.** An indigent parent involved in these proceedings is entitled to competent appointed counsel.[24] Claims of ineffective assistance of counsel are to be analyzed based on the principles developed in the criminal law context.[25]

11.3.5. *Presence of Parties*

Respondent has the right to be present or may appear through legal counsel.[26]

What obligation does the court have to ensure the presence of incarcerated parents? The Court of Appeals has applied a balancing test, comparing the legal interests at stake, the risk of error and the burden on the State of ensuring the presence of the incarcerated parent. In *Render*, the mother was incarcerated in the county jail and did not appear at the hearing where her parental rights were terminated. Under these facts, considering the minimum burden of securing the mother from the county jail, the Court of Appeals held that the trial court had a duty to secure the parent's presence because of the compelling nature of the parent's interest in his/her parental rights.[27] Even though counsel was in court on her behalf, the Appellate Court held that the Probate Court should have made an effort to bring the parent to the termination hearing so that the parent could be given a chance to present evidence concerning her fitness and efforts to provide a fit home for her child.

In *Vasquez,* however, where the father was incarcerated in a Texas prison, the Court held that an incarcerated father's absence from a parental rights termination hearing did not violate his due process rights where he was well represented by his counsel at the hearing so that no prejudice resulted from father's absence and where the financial and administrative burden on the State in order to bring the father from Texas would have been substantial.[28] The court rules do not require that the court secure the physical presence of a parent at a parental rights termination hearing, but only imply that the court shall not deny the parent's right to be present at the hearing.[29]

When a party fails to appear in response to a notice of the hearing, the court may order the party's appearance by summons or subpoena.[30] The

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24. *In re Rogers*, 160 Mich.App. 500 (1987)
25. *In re Simon*, 171 Mich.App. 443 (1988)
26. MCR 3.973(D)(2)
27. *In re Render*, 145 Mich.App. 344, 350-351 (1985)
28. *In re Vasquez*, 199 Mich.App. 44 (1993)
29. *Id*.
30. MCR 3.920(C)(4)

court may proceed in the absence of parties, however, provided that proper notice has been given.[31]

11.3.6. *Right to Judge; No Right to Jury*

There is no right to a jury in a termination proceeding.[32] Although a referee may hear a termination case, the parties have a right to a judge upon request.[33]

11.3.7. Burden of Proof; Standard of Proof; Clear and Convincing Evidence

The burden of proof is on the party seeking to terminate the parental rights of respondent.[34] Proofs must be clear and convincing that one or more factual grounds exist under MCL 712A.19b(3) to terminate parental rights.[35] In the case of an Indian child, parental rights shall not be terminated unless there is evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child.[36]

11.4. THE BEST INTERESTS OF THE CHILD STEP

Termination of parental rights over a child requires that a statutory basis for termination be established (under MCL 712A.19b(3).[37] The statute and court rules create a presumption that the best interests of the child will be served by termination, once the statutory grounds are met. In that case, separate findings of fact on the issue of best interests are not necessary[38]:

> (5) If the court finds that there are grounds for termination of parental rights, the court *shall* order termination of parental rights and order that additional efforts for reunification of the child with the parent shall not be made, unless the court finds that termination of parental rights to the child is *clearly not in the child's best interests*. (Emphasis added.)

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31. MCR 3.973(D)(3)
32. MCR 3.977(A)(3); *In re Mathers*, 371 Mich. 516 (1963)*; In re Oakes*, 53 Mich.App. 629 (1974)
33. MCR 3.913(A)(2)(c); MCR 3.912
34. MCR 3.977(A)(3)
35. MCR 3.977(E)(3), (F)(1), (G)(3)
36. MCR 3.980(D); Although the standard governing the termination of an American Indian child's parental rights is "beyond a reasonable doubt" while the standard for termination of a non-American Indian child's parental rights is "clear and convincing" no equal protection rights have been violated. *In re Miller*, 182 Mich.App. 70 (1990)
37. MCR 3.977(E)(3)(b), (F)(1)(b)(ii), (G)(3)(b)
38. MCL 712A.19b(5)

The best interest clause of subsection 19b(5) does not impose a burden of production on the party opposing termination. Nor does it impose any further burden of proof on the petitioner once the petitioner has carried its burden of establishing one or more grounds for termination. Rather, it unambiguously provides that once the petitioner proves at least one or more grounds for termination by clear and convincing evidence, the court must order termination. Read in its entirety, subsection 19b(5) preserves to the court the opportunity to find that termination is clearly not in the child's best interests despite the establishment of one or more grounds for termination. Under subsection 19b(5), the court may consider evidence introduced by any party when determining whether termination is clearly not in a child's best interest. Further, even where no best interest evidence is offered after a ground for termination has been established, subsection 19b(5) permits the court to find from evidence on the whole record that termination is clearly not in a child's best interests.[39]

Additionally, in its decision in *A.M.A.C.*, the Michigan Court of Appeals made clear: the trial court *must* address the child's best interests in its opinion. To do otherwise is a deviation from the clear mandate that the child's best interests be considered and that such findings and conclusions be stated in the record or in writing. *See In re Trejo, supra at* 351, 356, citing MCL 712A.19b(1).

"Best interests of the child" is not itself a basis for termination of parental rights, however.

> [T]he best interests of the child are relevant in proceedings under the Juvenile Code. That is not to say that the Probate Court can take jurisdiction of a child for the child's best interests absent the statutory basis under MCL 712A.2.... *In the Matter of Kurzawa*, 95 Mich App 346 (1980). Nor can the best interests of the child justify a termination of parental rights and a permanent custody order under section 19a, MCL 712A.19a [now renumbered as 19b] without clear and convincing proof of the statutory grounds therein ... *In the Matter of LaFlure*, 48 Mich App 377 (1973); 210 NW2d 482 (1973); *In the Matter of Atkins,* 112 Mich App 528; 316 NW2d 477 (1982).[40]

In *McIntyre*, the trial court terminated parental rights instead of placing the child with relatives. The Court of Appeals upheld the decision even though the mother's uncle had made considerable effort to plan for the children. In rendering the decision, the court specifically addressed the right of the uncle to petition for adoption. The Court reasoned that the children had been subjected to a lengthy period of the uncertainty of temporary wardship and deserved permanency.[41]

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39. *In re Trejo Minors*, 462 Mich. 341 (2000)
40. *In re Schejbal*, 131 Mich.App. 833, 836 (1984)
41. *In re McIntyre*, 192 Mich.App. 47 (1991)

11.5. TERMINATION OF PARENTAL RIGHTS AT THE INITIAL DISPOSITION

The court shall terminate the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if[42]:

1. the original, or amended, petition contains a request for termination;
2. at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;
3. at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial, or at plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:

    a. are true,
    b. establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n).

    unless the court finds, by clear and convincing evidence, in accordance with the rules of evidence as provided in subrule (G)(2), that termination of parental rights is not in the best interest of the child.[43]

The Michigan Court of Appeals in *Gazella* held that *Adrianson* orders violate both the statute and the court rule.

> In an *Adrianson* proceeding, the trial court would enter an order terminating the parents' rights following the necessary statutory findings, but then enter a further order suspending the order terminating the parents' rights on condition that the parents comply with certain requirements designed to assist their rehabilitation. If the parents were successful, the order terminating their rights would be set aside and never take effect. Should the parents not be successful, the order terminating rights would be permitted to go into effect. Once an order terminating parental rights was entered, the petitioner need prove nothing further; the burden of proof shifted to the parents to show that they had successfully complied with the conditions under which the order terminating their parental rights was suspended.[44]

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42. MCL 712A.19b(4)
43. MCR 3.977(E)(3)
44. *In re Gazella*, 264 Mich. App. 668, 673-674 (2005)

The statute and the court rule are clear once the court finds there are statutory grounds for termination of parental rights, the court must order termination of parental rights and must further order that "additional efforts for reunification of the child with the parent not be made," unless the court finds that termination of parental rights to the child is clearly not in the child's best interests.

See **Chapter 5**, **PETITION,** for a discussion of circumstances in which the statute mandates a petition seeking termination of parental rights at the first dispositional hearing.

11.6. TERMINATION OF PARENTAL RIGHTS; OTHER

If the parental rights of the respondent over the child are not terminated at the initial dispositional hearing or at a hearing on a supplemental petition on the basis of different circumstances, and the child is in foster care in the temporary custody of the court, the court following a dispositional review hearing under MCR 3.975, a progress review hearing under MCR 3.974, or a permanency planning hearing under MCR 3.976 may take action on a supplemental petition that seeks to terminate the parental rights of respondent over the child on the basis of one or more grounds listed in MCL 712A.19b(3).[45]

11.7. TERMINATION OF PARENTAL RIGHTS ON THE BASIS OF DIFFERENT CIRCUMSTANCES

11.7.1. *New or Different Offense*

Once the court has acquired jurisdiction, new information may come to light or additional maltreatment of the children may occur, which itself might warrant termination of parental rights. For instance, the court may have acquired jurisdiction based on physical abuse; after a period in foster care, the child makes disclosures of serious neglect or sexual abuse.

The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstance new or different from the offense that lead the court to take jurisdiction. Since the proceedings are continuous in nature, once a case enters the dispositional phase, any subsequently filed petition that alleges new instances of abuse or neglect does not create an entirely new case that requires the court to redetermine jurisdiction and afford the respondent the right to a jury trial.[46] The new or different circumstance that forms the basis of a termination of parental rights petition must fall within MCL

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45. MCR 3.977(G)

46. *In re Miller*, 178 Mich.App. 684 (1989)

712A.19b(3), except for MCL 712A.19b(3)(c)(i), and must be sufficient to warrant termination of parental rights.

11.7.2. *Fact-finding Step*

Legally admissible evidence must be used to establish the factual basis of parental unfitness sufficient to warrant termination of parental rights. Proofs must be clear and convincing (except for Indian children where the proofs must be beyond a reasonable doubt, *see* MCR 3.980).

11.7.3. *Best Interest Step*

Once it is established that one or more grounds exist under MCL 712A.19b(3), except MCL 712A.19b(3)(c)(i), to permanently terminate the parental rights of respondent over the child, the court shall terminate parental rights unless it finds that doing so is clearly not in the best interests of the child.[47]

11.8. EVIDENCE

The quality of evidence required in a termination proceeding depends on whether or not the termination is sought on grounds closely related to the basis of the original court jurisdiction and thus already established on the record. Michigan Court Rules identify three distinct types of termination of parental rights actions -- all requiring the same factual showing of parental unfitness under MCL 712A.19b but with varying quality of evidence required:

1. Termination of parental rights at the initial disposition[48];
2. Termination based on different circumstances from the offense that lead the court to take jurisdiction originally[49]; and
3. Termination after a period in foster care, or not in foster care, based on circumstances closely related to those that led the court to assume jurisdiction originally.[50]

Legally admissible evidence is required to terminate parental rights at the initial disposition and on the basis of new or different circumstances.[51] In the third circumstance, termination may be based on the more relaxed standard of relevant

47. MCL 712A.19b(5); MCR 3.977(F)(1)(b)
48. MCR 3.977(E)
49. MCR 3.977(F)
50. MCR 3.977(G)
51. MCR 3.977(E)(3); MCR 3.977(F)(1)(b); MCL 712A.19(1); *see also*, *In re Snyder*, 223 Mich.App. 85 (1997)

and material evidence to the extent of its probative value.[52] Thus hearsay evidence is admissible in this third circumstance[53]:

> (2). *Evidence*. At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value, even though such evidence may not be admissible at trial. The respondent and the petitioner shall be afforded an opportunity to examine and controvert written reports so received and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.

Even though legally admissible evidence is required to support the factual showing where termination is sought at the first disposition or on the basis of new or different circumstances, evidence going to whether termination is in the best interests of the child need only be relevant and material according to MCR 3.977(E)(3).[54]

Hearsay, which is fair, reliable and trustworthy, has been held admissible in termination cases.[55] The court consider as evidence the records of all previous hearings as the Child Protection Proceedings are one continuous proceeding.[56] *See* **Chapter 16: EVIDENCE**.

11.9. TIME

Regarding termination at the initial disposition, the trial is to be held within 63 days of the child's placement and the interval, if any, between trial and dispositional hearing must not be more than 35 days, except for good cause.[57]

Regarding termination where the child remains in foster care, the supplemental petition for termination of parental rights is to be filed no later than 42 days after a permanency planning hearing where the court has initially determined that the child should not be returned to the parent and the agency has failed to demonstrate that initiating termination proceedings is not clearly in the child's best interest.[58] Once the supplemental petition is filed, the hearing on the petition for termination of parental rights must be held within *42 days* after the filing of the supplemental petition. The court may, for good cause shown, extend the time period for an additional 21 days.[59]

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52. MCR 3.977(G)(2)
53. MCR 3.977(G)(2)
54. MCR 3.977(E)(3) (initial disposition); MCR 3.977(F)(1)(changed circumstances)
55. *In re Hinson*, 135 Mich.App. 472, 474 (1984); *In re Kantola*, 139 Mich.App. 23, 25 (1984); *In re Ovalle*, 140 Mich.App. 79, 82 (1985)
56. *In re LaFlure*, 48 Mich.App. 377, 391 (1973); *In re Sharpe*, 68 Mich.App. 619, 626 (1976)
57. MCR 3.972(A); MCR 3.973(C)
58. MCR 3.976(E)(2)
59. MCR 3.977(F)(2) and (G)(1)(b)

Within 70 days after commencement of the initial hearing on the petition to terminate parental rights, the court shall issue an opinion or order.[60] Thus the court is expected to bring the termination hearing to a conclusion within 70 days. The court's failure to issue an opinion within the time limits does not dismiss the petition.[61]

There is no sanction for violation of these time requirements although the State Court Administrative Office is required to make an annual public report on each court's compliance with the child protection time limits. There is no due process violation for respondent if time requirements are not met.[62] Reversal of a termination of parental rights is not provided for in the rules as a sanction.[63]

11.10. GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

MCL 712A.19b(3) provides "The court may terminate the parental rights of a parent to a child if the court finds, by clear and convincing evidence, 1 or more of the following." A list of the statutory grounds/ bases for termination follows.

11.10.1. Desertion

(a) The child has been deserted under any of the following circumstances[64]:

(i) If the parent of a child is unidentifiable and has deserted the child for 28 days and has not sought custody of the child during that period. For the purposes of this section, a parent is unidentifiable if the parent's identity cannot be ascertained after reasonable efforts have been made to locate and identify the parent.

(ii) The parent of a child has deserted the child for 91 or more days and has not sought custody of the child during that period.

(iii) The child's parent voluntarily surrendered the child to an emergency service provider under chapter XII and did not petition the court

60. MCL 712A.19b(1)

61. *Id.*

62. *In re Kirkwood*, 187 Mich.App. 542 (1991); *Dept. of Social Services v. Jackson*, 199 Mich.App. 22 (1993)

63. *In re Pardee*, 190 Mich.App. 243 (1991)

64. MCL 71A.19b(3)(a); *see also*, Safe Delivery of Newborns, MCL 712.1-20 and MCL 712A.19b(3)(a)(iii)

> to regain custody within 28 days after surrendering the child.

"Desertion" is not specifically defined in the statute or rules. Webster's defines it as "the abandonment without consent or legal justification of a person, post, or relationship and the associated duties and obligations."[65]

Consider, for example, under section (3)(a)(i), a child found abandoned on a doorstep or under the bushes near a hospital. The Agency conducts a thorough search for the parents of the child, going door to door in the neighborhood and using newspapers and other media. If no parents come forward, this section authorizes termination after 28 days. The petitioner should (1) present evidence of the date and circumstances under which the child was found showing that the child was deserted, and (2) prove that the attempts to identify and locate the parent were reasonable.

Consider, for example, under section (3)(a)(ii), a parent whose whereabouts are unknown for over 91 days and during that time makes no contact with the child and provides no support.[66] Perhaps John Doe is the father of the child but his whereabouts are unknown and he has neither contacted nor supported the child for a period in excess of 91 days. Perhaps a parent, addicted to crack cocaine, stops contacting the caseworker or the child despite knowing how to do so and having an obligation to do so under a case plan. Every 91 days of such non-contact may constitute desertion under the statute and warrant a termination of parental rights. A later re-emergence does not defeat the existence of this ground.

> Effective January 1, 2001, the Michigan legislature passed the Safe Delivery of Newborns Law (MCL 712.1-20), making it legal for a parent to surrender his or her infant in a safe and anonymous manner. Unharmed newborns, up to 72 hours old, can be taken to an Emergency Service Provider (ESP), meaning a uniformed or otherwise identified employee of a fire department, hospital or police department who is inside the building and on duty. The parent has the choice to leave the infant without giving any identifying information to the ESP. The ESP is authorized to accept the infant and provide whatever care is necessary. The ESP will make a reasonable effort to provide the parent with the following information:
>
> (1) A written statement of the parent's rights following the surrender of the infant;

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65. Webster's Ninth New Collegiate Dictionary, 1987

66. *See*, for example, *In re Hall*, 188 Mich.App. 217 (1991); *In re Mayfield*, 198 Mich.App. 226 (1993)

(2) Information about other confidential infant placement options; and
(3) Information about the availability of confidential medical and counseling services.

The surrendering parent is to be informed that by surrendering the newborn, the parent is releasing the newborn to a child-placing agency to be placed for adoption. The parent has 28 days to petition the court to regain custody of the newborn. Any information the parent provides the ESP will not be made public. A criminal investigation shall not be conducted solely on the basis of a newborn be surrendered to an ESP. After the 28-day period for the parent to petition the court for custody elapses, there will be a public hearing to terminate parental rights. There will be a public notice of this hearing and the notice will not contain the parent's name, even if known. The parent will not receive personal notice of the hearing, even if the parent has provided a name and address to the ESP. The infant will be placed for adoption as soon as parental rights have been legally terminated.

11.10.2. *Physical or Sexual Abuse; Failure to Protect*

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under one or more of the following circumstances:
(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.
(iii) A nonparent adult's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.[67]

Termination of parental rights was warranted based upon a father's imprisonment for eight years for sexually abusing his older daughter.[68]

67. MCL 712A.19b(3)(b)

68. *In re Vasquez*, 199 Mich.App. 44 (1993)

11.10.3. *Conditions Not Rectified*

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following[69]:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(ii) Other conditions exist that cause the child to come within the jurisdiction of the court, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice, a hearing, and been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

Within the time allotted by statute, a parent must benefit from services, not merely "go through the motions" of complying.[70] In keeping with a child's sense of time and need for stability and continuity, this section permits termination after six months (182 days) if the original neglectful conditions persist or if new conditions have arisen and the parent, after opportunity to rectify the conditions, has not done so and there is no likelihood that he or she will do so in the near future. In *Dahms* a mother was afforded a reasonable time within which to improve conditions where an expert indicated that two to three years of additional therapy were necessary for her to reach an acceptable level of parenting skill and where, given the children's behavior disorders, the children could not wait that long.[71]

The language "within a reasonable length of time considering the age of the child" appears in sections 3(c), (d) and (e) and creates a flexible standard depending on psychological development and needs of the child. A young child's sense of time requires permanent plans relatively soon -- within a year or so. Mental illness and drug addiction may require a prolonged length of time for treatment. Younger children cannot wait long periods for parents to be rehabilitated. The younger child's chances for adoption are also somewhat greater the younger he or she is. Even though older children need prompt resolution of their temporary status,

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69. MCL 712A.19b(3)(c)

70. *In re Gazella*, 264 Mich. App. 668, 676 (2005).

71. *In re Dahms*, 187 Mich.App. 644 (1991)

they can afford to wait somewhat longer than the very young child. A somewhat older child will remember the parent and be psychologically better able to wait a longer time for reunification. Chances for adoption or successful permanent placement in an alternative home may not be affected as much by longer delays.

In *Newman*, however, the court reversed a termination of parental rights, finding that the parents had not been provided an adequate opportunity to demonstrate their parenting abilities and there was insufficient proof that the conditions could not be remedied in a reasonable time.[72]

11.10.4. *Failure to Comply with Limited Guardianship Placement Plan*

There are three sections of the termination statute that provide for grounds for termination of parental rights when a child has first been the subject of a guardianship which has failed to meet the needs of the child in several important respects. Section MCL 712A.2(b) includes grounds for temporary wardship based on failed guardianships. These sections provide the authority to terminate parental rights. This first says[73]:

(d) The parent of a child has placed the child in a limited guardianship under section 5205 of the estates and protected individual code, 1998 PA 386, MCL 700.5205, and has substantially failed, without good cause, to comply with a limited guardianship placement plan described in section 5205 of the estates and protected individual code, 1998 PA 386, MCL 700.5205, regarding the child to the extent that such noncompliance has resulted in a disruption of the parent-child relationship.

11.10.5. *Failure to Comply with Court-Structured Full Guardianship Plan*

(e) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and the parent has substantially failed, without good cause, to comply with a court-structured plan described in section 5207 or 5209 of the estates and protected individuals code, 1998 PA 386, MCL 700.5207 and 700.5209, regarding the child to the extent that such noncompliance has resulted in a disruption of the parent-child relationship.[74]

11.10.6. *Parent of Child under Guardianship Drops Out*

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72. *In re Newman*, 189 Mich.App. 61 (1991)

73. MCL 712A.19b(3)(d)

74. MCL 712A.19b(3)(e)

(f) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and both of the following have occurred[75]:

(i) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of two years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.

(ii) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

11.10.7. *Failure and Inability to Provide Proper Care and Custody*

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.[76]

Parents who are chronically and seriously mentally ill or developmentally disabled *and* unable to care for the child may fall under this statute. The new statute eliminates the former requirement of a two-year period of inability to provide proper care and clearly does not require a showing of intent. This section will also reach parents who are chronically and permanently neglectful of their children for no apparent reason or for reasons other than mental illness -- including chronic addiction to drugs.

In *Jackson*, the court relied upon testimony of a psychiatrist who assessed the mother and testified that the mother's paranoid schizophrenia could be controlled but not cured, and that the children would be at risk if left with the mother.[77] In *Hulbert*, however, expert opinions that the parents' "borderline" mental conditions might render them unfit or ineffective parents was insufficient to warrant termination of parental rights in light of minimal evidence of actual past neglect. Speculative opinions regarding what might happen in the future did not constitute the required "clear and convincing evidence" of both failure and inability to provide proper care and custody.[78] In *IEM*, the Court of Appeals upheld

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75. MCL 712A.19b(3)(f)

76. MCL 712A.19b(3)(g)

77. *In re Jackson*, 199 Mich.App. 22 (1993)

78. *In re Hulbert*, 186 Mich.App. 600 (1990)

termination supported by evidence that because of emotional and cognitive problems, the mother would be unable to be an effective parent no matter how well she was assisted.[79]

Also, noteworthy, the Supreme Court held in *In re JK*, that "a parent's failure to comply with the parent-agency agreement is evidence of a parent's failure to provide proper care and custody for the child," warranting termination under subsection 19b(3)(g).[80]

11.10.8. *Parental Imprisonment*

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.[81]

This section is very similar to the language of the termination statute before the 1989 amendments so that previous court interpretations are useful. The court may not take jurisdiction under MCL 712A.2(b) and make the child a temporary ward where a parent has placed children with relatives or other custodians prior to entering prison unless there are other grounds for legal neglect than "without proper custody or guardianship." That phrase "does not include the situation where a parent has placed the child with another person who is legally responsible for the care and maintenance of the child and who is able to and does provide the child with proper care and maintenance."[82]

A prisoner has the opportunity to place his or her children with relatives or some other suitable placement, and the State has no authority to interfere as long as the placements themselves are fit.[83] Imprisonment alone, without a showing that the child will be deprived of a normal home for more than two years, is not a sufficient ground for termination. The Court of Appeals on remand in *Kidder* said,

> The circuit court *** has concluded that while defendant's incarceration was, by itself, insufficient to warrant termination of

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79. *In re IEM*, 233 Mich.App. 438 (1999)

80. *In re JK*, 468 Mich. 202 (2003)

81. MCL 712A.19b(3)(h)

82. MCL 712A.2(b)(1)(B); *See* **Chapter 3, JURISDICTION**

83. *In re Curry*, 113 Mich.App. 821 (1982); *In re Ward*, 104 Mich.App. 354 (1981); *See also In re Taurus*, 415 Mich. 512 (1982)

> defendant's parental rights, his incarceration plus his intended reconciliation with his wife was sufficient. We agree.[84]

Where a parent died without providing a guardian for a child, the court was justified in making the child a ward of the court based on improper custody and guardianship. A termination against the father, imprisoned for life and having done nothing to provide for the child was upheld.[85]

In *Perry* the father was sentenced to prison for raping one of his children. At the time of the termination hearing he had served enough of his sentence so that he was eligible for parole in less than two years. The Court of Appeals applied the two-year requirement prospectively only and said the proper determination is "whether the imprisonment will deprive a child of a normal home for two years in the future, and not whether past incarceration has already deprived the child of a normal home". The termination was upheld, however, because MCL 712A.19b(3)(g), improper care or custody, was satisfied by the proofs since that ground did not require imprisonment such to deprive a child of a normal home for two years.[86]

11.10.9. *Parental Rights to A Sibling Terminated*

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.[87]

This section is a codification of Michigan Court of Appeals' decisions holding that evidence of how a parent treats one child is probative of how that parent will treat other children.[88] This section goes far beyond these decisions, however, when it explicitly provides that prior termination coupled with prior unsuccessful efforts at rehabilitation is a basis for termination of parental rights on siblings. There are persons unable to parent who continue to have children. This provision can be used to terminate parental rights fairly quickly and make these children available for adoption or other permanent placement without subjecting the children to the known risk of serious harm at the hands of inadequate parents.

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84. *In re Kidde*r, (on remand) 61 Mich.App. 451, 453 (1975)
85. *In re Hurlbut*, 154 Mich.App. 417 (1986)
86. *In re Perry*, 193 Mich.App. 648 (1992). *See also In re Neal*, 163 Mich.App. 522 (1987), where the court of appeals found a period of imprisonment even *less than two years* may provide the basis for termination so long as the term of imprisonment will deprive a child "of a normal home for a period exceeding two years."
87. MCL 712A.19b(3)(i)
88. I*n re LaFlure*, 48 Mich.App. 377, 392 (1973); *In re Dittrick Infant*, 80 Mich.App. 219, 222 (1977); *In re Anderson* 155 Mich.App. 615 (1986)

See discussion of sections (l) and (m), however, where termination is authorized based on previous termination but without the need for prior attempts to rehabilitate the parents.

11.10.10. *Risk of Harm if Returned to Parent*

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.[89]

This ground is commonly used in the trial court as a basis of terminating parental rights.

11.10.11. *Serious Child Abuse*

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following[90]:
- (i) Abandonment of a young child.
- (ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.
- (iii) Battering, torture, or other severe physical abuse.
- (iv) Loss or serious impairment of an organ or limb.
- (v) Life threatening injury.
- (vi) Murder or attempted murder.
- (vii) Voluntary Manslaughter
- (viii) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.

11.10.12. *Previous Termination*

(l) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state.[91]

(m) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a similar law of another state.[92]

11.10.13. *Conviction of a Serious Offense*

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89. MCL 712A.19b(3)(j)
90. MCL 712A.19b(3)(k)
91. MCL 712A.19b(3)(l)
92. MCL 712A.19b(3)(m)

(n) The parent is convicted of 1 or more of the following, and the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child[93]:

(i) A violation of section 316, 317, 520b, 520c, 520d, 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.316, 750.317, 750.520b, 750.520c, 750.520d, 750.520e, and 750.520g. [first-degree murder, second degree murder, criminal sexual conduct or assault with intent to commit criminal sexual conduct]

(ii) A violation of a criminal statute, an element of which is the use of force or the threat of force, and which subjects the parent to sentencing under [habitual offender sentencing provisions] section 10, 11, or 12 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.10, 769.11, and 769.12.

(iii) A federal law or law of another state with provisions substantially similar to a crime or procedure listed or described in subparagraph (i) or (ii).

This section, effective July 1, 1999, for which there are no reported cases.

11.11. TERMINATION OF ONE PARENT ONLY

Unlike jurisdiction, which does not need to be established as to each parent, rather as to the child, termination requires a case must be made against each parent separately. The court rules refer to “respondent” and define the term to include the mother and/or the father of the child.[94] The two parents are to be addressed separately and not jointly. The statute allows the court to terminate "the parental rights of *a parent*" and allows the child placed in the permanent custody of the court, "if all parental rights to the child are terminated."[95] (emphasis added)

The Supreme Court addressed this issue in *In re Arntz* when it held that the court may terminate the rights of only one parent and that a court must make findings that justify a termination order as to each parent.[96]

11.12. COMPARISON OF HOMES

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93. MCL 712A.19b(3)(n)
94. MCR 3.977(B)
95. MCL 712A.19b(3); *In re Marin*, 198 Mich.App. 560, 566 (1993), use of singular “parent” indicates legislative intent to allow termination of one parent’s rights; MCL 712A.19b(1)
96. *In re Arntz*, 418 Mich. 941 (1984)

The Supreme Court in *Fritts v Krugh* held that it is inappropriate to weigh the advantages of a foster home against the home of the natural parents in determining parental fitness. Fitness of parents and the questions of neglect of their children must be measured by the statutory standards without considering any alternative home available to the children.[97] Similarly in *Mathers* when a trial judge allowed testimony to the jury concerning the suitability, stability and affection of adoptive parents, the Supreme Court held that such testimony was relevant only at disposition, prejudicial before the jury, and contrary to the holding of *Fritts v Krugh*.[98]

As the concerns for permanency for children bring more and more termination cases before the courts, however, the court seems justified, at the best interests step and after finding a statutory basis for termination, in asking what benefit the child will receive from termination of parental rights. Petitioners and child advocates should present testimony on plans for permanent placement as long it clearly goes to best interests of the child and is to be considered only after the court has made a determination on the statutory grounds.

11.13. FINDINGS

An order terminating parental rights under the Juvenile Code may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order. Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient. The court may state the findings and conclusions on the record or include them in a written opinion. If the court does not issue a decision on the record following hearing, it shall file its decision within 28 days after the taking of final proofs.[99] Such opinion or order must be issued within 70 days of commencing a termination hearing.[100]
An order terminating parental rights based on stipulation of the parties, together with an opportunity to set aside the order if 11 specified conditions were met, is a procedure disapproved by the Court of Appeals and not established by statute. In that case the parent did not waive the right to have neglect shown by clear and convincing evidence and the procedure placed undue emphasis on compliance with a prior order.[101] A parent can release their rights, but not stipulate to an order that can later be set aside.[102]

11.14. ADVICE OF RIGHT: TO APPEAL, TO AN ATTORNEY, TO TRANSCRIPTS, ABOUT IDENTIFYING INFORMATION

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97. *Fritts v. Krugh*, 354 Mich. 97, 115 (1958)
98. *In re Mathers*, 371 Mich. 516 (1963)
99. MCR 3.977(H)(1)
100. MCL 712A.19b(1)
101. *In re Bedwell*, 160 Mich.App. 168 (1987)
102. *In the Matter of Gazella*, 264 Mich.App. 668 (2004)

11.14.1. *Advice*

Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that[103]:

a) The respondent is entitled to appellate review of the order;
b) If the respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the portions of the transcripts and record the attorney requires to appeal;
c) A request for the assistance of an attorney must be made within 14 days after notice of the order is given or an order is entered denying a timely filed post judgment motion. The court must then give a form to the respondent with the instructions (to be repeated on the form) that if the respondent desires the appointment of an attorney, the form must be returned to the court within the required period of time (to be stated on the form); and
d) The respondent has the right to file a denial of release of identifying information, a revocation of a denial of release, and to keep current the respondent's name and address as provided in MCL 710.27; MSA 27.3178(555.27), as amended.

11.14.2. *Appointment of Attorney*

a) If a request is timely filed and the court finds that the respondent is financially unable to provide his or her own attorney, the court shall appoint an attorney within 14 days after the respondent's request if filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.
b) In a case involving the termination of parental rights, the order described in (I)(2) and (3) must be entered on a form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Order Appointing Counsel," and the court must immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case.
The court must also file in the Court of Appeals proof of having made service of the Claim of Appeal and Order Appointing Counsel on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13(1)(f), and the guardian ad litem or

103. MCR 3.977(I)(1)

attorney (if any) for the child(ren). Entry of the order by the trial court pursuant to this subrule constitutes a timely claim of appeal for the purposes of MCR 7.204.[104]

11.14.3. *Transcripts*

If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense.[105]

104. MCR 3.977(I)(2)
105. MCR 3.977(I)(3)